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IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; AND DAVID MULLINS,
Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF FOR CAKE ARTISTS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

AARON M. STREETT
BENJAMIN A. GESLISON
J. MARK LITTLE
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
(713) 229-1234

EVAN A. YOUNG
Counsel of Record
SAMANTHA KUHN
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Suite 1500
Austin, Texas 78701-4078
(512) 322-2500
evan.young@bakerbotts.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF *AMICI CURIAE*

Amici are a group of individual cake artists from across the United States.[1] They design, bake, and decorate cakes that their fellow citizens commission from them. These customized cakes commemorate the occasions that figure most prominently in the lives and memories of our families and communities: weddings and anniversaries, farewells and retirements, graduations and

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution. Letters from counsel of record for petitioners, the State respondents, and the individual respondents are on file with the clerk's office.

promotions, birthdays and the anticipation of births, holidays and milestones, and sometimes, alas, memorials of those no longer with us.

For occasions large or small, *amici* and many like them take great pride in exerting enormous energy to infuse their clients' events with meaning and beauty. Whether festive or solemn, celebratory or mournful, *amici* have devoted themselves to artistic work that is simultaneously painstaking and exhilarating. They know that their clients and customers depend on them for what often is the centerpiece of an event—frequently a *once-in-a-lifetime* event. Cake artists are fully aware, for example, that all eyes will be trained on their work when the time comes for a new couple to "cut the cake."

Amici take no position as to which party should prevail in this specific case. Their interest lies in making a single point—that their work, like that of petitioner Jack Phillips, requires artistic exertion within an expressive endeavor to generate works of art. Many of the *amici* listed below would gladly have prepared the cake that respondents requested—but they would have done so by accepting a commission to create a work of edible *art*. *Amici* wish to illustrate—literally, through the images of their own work in this brief—that cake design and preparation *is an art*.

This group signals the diversity of the many cake artists beyond *amici* themselves who would be affected were this Court to base any aspect of its decision on the mistaken premise that designing and preparing custom cakes is less than artistic and expressive. *Amici* are artists from small cities and large. Some have been cake artists for decades, and others are relatively new. Some work from their homes, while others own well-established award-winning bakeries. Many have had their work prominently featured in magazines and other media. At least one has had cakes featured in a major

museum. *Amici* include:

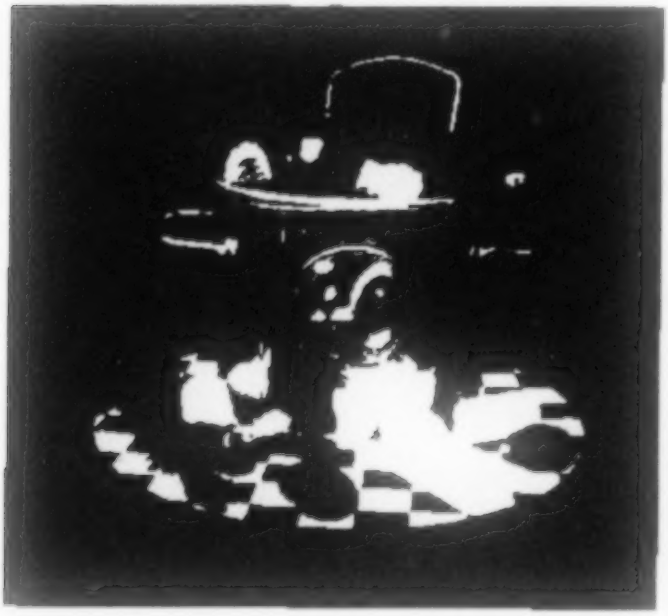
- Kim Brittenburg, of Kym's Creations in Allentown, Pennsylvania
- Jill Griebel, of The Hayloft in Hoagland, Indiana
- Erin Holloway, of Art of Cakes Bakery in Maryville, Tennessee
- Sonia Humerickhouse, of Antigo Cakes in Gilbert, Arizona
- Hilary Hummer, an independent cake designer in Marathon, Wisconsin
- Chelle Jennings, of Mad Batter Bakery in Tucson, Arizona
- Jennifer Jones, of Icing On The Top in Tulsa, Oklahoma
- Kristi Kloos, of Frost Bake Shop in East Memphis and Collierville, Tennessee
- Lexi Ginsburg Mota, of The Cakerie in Birmingham, Alabama
- Tricia Quinn, of Sweet Blessings Bakery in Pittsburg, Texas
- Jan Sullivan, of Bakery Blessings, recently in Lexington, Kentucky and soon to relocate to Georgia

SUMMARY OF ARGUMENT

1. Designing and preparing custom cakes is an art. The images of *amici*'s cakes in the following pages amply justify the cliché that a picture is worth a thousand words. If this brief did nothing beyond showcasing this small sample of creative work, it would surely convey that these unique projects involve artistic talent and communicate emotions and messages at least as clearly as other forms of art.

But there is far more. While the artistry of these images is self-evident, in a number of cases *amici* have provided background to set their cakes in context. What

might seem like just a beautiful, unique cake (which is enough by itself, of course) often turns out to convey deep additional meaning to the audience for which it was intended. A cake that depicts crawfish in a pot—perhaps not quite aware that they are soon to be boiled—is



entertaining and impressive. But to a wife from Louisiana who recently moved to Birmingham, Alabama, it was a special way to mark a surprise birthday—a way to bring a taste of home to the celebration. Lexi Ginsburg Mota, of The Cakerie in Birmingham, designed this cake as a way to convey a happy sense of home for a birthday. In this and many other cakes that will appear in this brief,[2] cake artists use their talents to do what the rest of us cannot—create images of beauty that evoke ideas and emotions in deliciously edible form.

Cakes for every conceivable occasion, ranging from the grandeur of weddings to abject apologies (see *infra* p. 24), can convey articulable messages. Sometimes words are used to assist in conveying those messages. But the art of custom cake design and creation is not so limited. Other times, the art behind a cake is simply sheer beauty or the technical mastery that it required. Cake artists must be adept at a multitude of artistic endeavors beyond

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[2] Except as noted, the pictures in this brief came directly from each member of the group of *amici*.

simply "baking." They must have visual-arts skills to design a cake that is pleasing to the eye—painting, drawing, and sculpting. They need the skills of an interior designer to create a unified whole from a series of individually artistic elements. They require the grace and technical powers of an architect, so that the final product moves from the theoretical to the real. It would be memorable, but disappointing, if a wedding cake collapsed while en route to the venue, or while sitting on display, or upon the first cut.

However the Court chooses to resolve this case, therefore, it should do so with full appreciation that the preparation of custom cakes is an artistic, expressive activity. The cakes shown in this brief, often with accompanying explanations, should remove any doubts.

2. Even if the work of *amici* and those who share their art were alone insufficient to establish the point, this Court's cases already provide a framework to confirm that custom cakes are part of an artistic, expressive endeavor that generates works of art.

The parameters of expressive conduct and speech may not always be bright lines in every context, but custom cakes like those in this brief fit comfortably within the stingiest reading of this Court's precedents. Taking the reverse analytical path, moreover, confirms the same result—given the sorts of conduct and products that *have* been authoritatively construed as speech or as expressive by this Court, it is inconceivable that custom cakes would not qualify.

Finally, the artistic character of custom cakes finds support in federal intellectual property law. Copyright law recognizes "useful articles" as protected "artistic works" so long as artistic elements can be isolated that are distinct from a product's functional aspect. Custom cakes readily satisfy this test, and thus it is no surprise

that the Library of Congress Copyright Catalog reveals thousands and thousands of examples of copyrights relating to cake design.

ARGUMENT

This case involves custom cakes that are unique works of art, specially crafted with a particular client's needs in mind. Until now, this Court has not had the opportunity to think deeply about that kind of cake. In 1962, apparently the last time that cakes played a significant role in a Supreme Court case, the Court considered the opposite extreme—not the customized cake-making of this case, but industrial, mass production of fungible cakes to be sold to any buyer. See *Drake Bakeries, Inc.* v. *Local 50, Am. Bakery & Confectionery Workers Int'l, AFL-CIO*, 370 U.S. 254 (1962). The "company's business [was] baking and selling cakes and other bakery products" on such a vast scale that management sought to compel unionized workers to appear the day after both Christmas and New Year's Day, despite being Saturdays, to ensure sufficient amounts of "fresh bakery products to sell on the Mondays following the holidays . . . ." *Id.* at 256.

The cakes in this case are utterly different from such commoditized products. *Amici* and those like them are not churning out wares to be peddled and purchased by those motivated primarily by hunger or the cravings of a sweet tooth. Rather, they create memorable works of art that are edible—art designed to be shared, after being admired, by a group that jointly celebrates, acknowledges, or mourns. And sometimes they do what industrial bakers never would do, but that artists do all the time—they create cakes without any specific function solely for the sheer beauty or challenge.

I. The Design And Preparation Of Custom Cakes Is An Artistic And Expressive Activity

Cake-making and other culinary arts implicate more of our senses than most other mediums of expression. Sight is critically important, of course, and this brief necessarily relies primarily upon this sense. But so is taste—cakes are ultimately designed to be eaten and enjoyed, contributing in that way to the shared experience of the group privileged to consume them. Smell is closely linked to taste, and can enhance one's appreciation of a cake. The sense of touch is crucial as well—the texture of the cake and of the cake's ornamentation contributes to the cake's overall appearance and how it is enjoyed when eaten.

Cake artists work to maximize the effect of their art on all of these senses. While technology does not yet permit the filing of a brief that enables touch, taste, and smell, Part I of this brief offers the Court the opportunity to see some of *amici*'s works of art, set alongside notes providing a small amount of context.

A. Wedding cakes are the most iconic examples of the cake artist's craft

This case happens to involve wedding cakes. As discussed below, that category certainly does not exhaust the entire universe of expressive, custom cakes. But it is a sensible place to begin because most Americans are so familiar with eating (and many American parents are familiar with *paying* for) wedding cakes. The seemingly steep cost is more readily appreciated when the true artistic nature of these cakes is clearer.

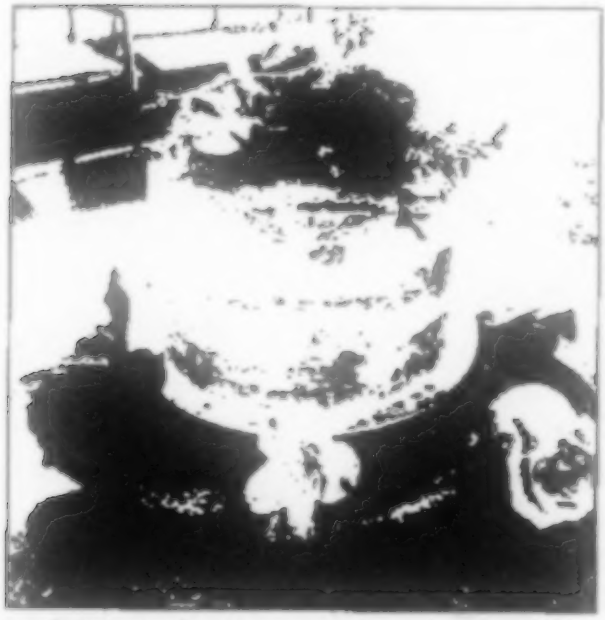
1. *Traditional wedding cakes are readily identified at a glance, but their magic lies in their details*

Americans can instantly distinguish traditional wedding cakes from cakes serving virtually any other pur-



pose. Frequently multi-layered with each successively higher tier narrower than the one below; usually white; generously apportioned with icing—we can identify that cake's purpose as quickly as we can distinguish the American flag from those of other countries. But custom wedding cakes—even of the traditional variety—typically involve subtle elements that reflect the personality of the new couple (and perhaps the artist). The classic example shown here was designed by Jill Griebel of The Hayloft.

But traditional cakes can also incorporate more stylish accents that subtly depart from the default, familiar attributes that we have come to expect. The first wedding cake that Sonia Humerickhouse of Antigo Cakes designed drew upon her specialty in "naked cakes"—cakes where icing or frosting is not thickly layered upon every part of the cake, thus allowing the cake's shape and texture to more readily be seen. Yet this cake is clearly recognizable as a stunning wedding cake.



2. *Imaginative wedding cakes that add new features*

Cakes can still be instantly identifiable as part of the

wedding genre yet involve stunning and unique elements that appear only as part of a special design.



Such cakes can often adopt themes, such as this "Alice in Wonderland" themed cake created by Lexi Ginsburg Mota and her colleague at The Cakerie. The bride's favorite stories growing up were those involving Alice, and the new couple asked to incorporate that theme into their wedding cake. Notably, the cake is clearly designed to celebrate a wedding—and yet the painstaking detail, with each image hand-drawn and every bit of decoration arranged by hand, illustrates how singular it is.

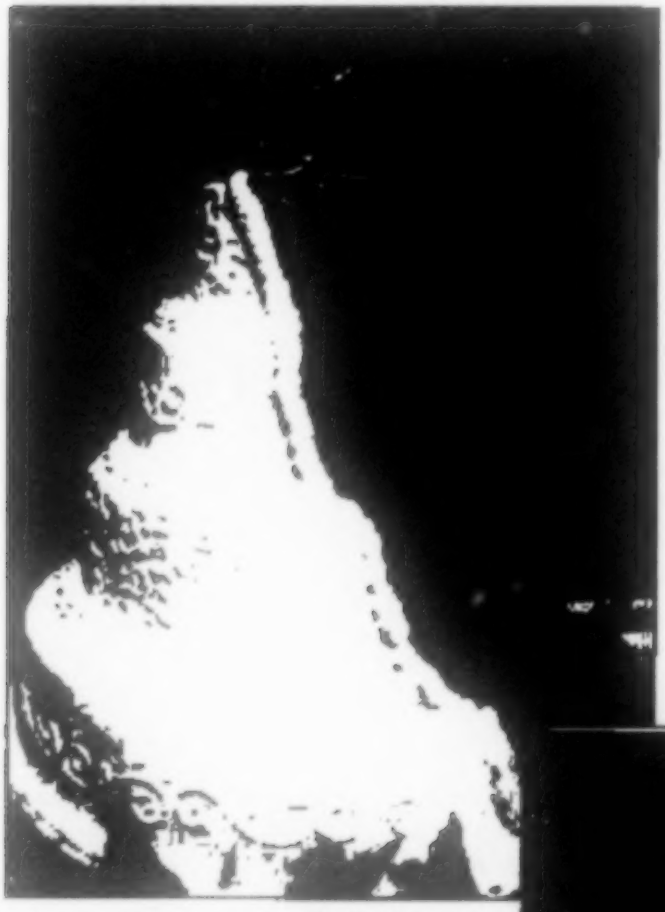
Another example, also from Lexi Mota, is this wedding cake reminiscent of a Herend china pattern. The cake



Photo by Mary Margaret Smith photography

was commissioned by a company that, among other wedding-related services, tailors wedding invitations to match the china pattern that a couple selects, and the cake was used at an event for the company.

Jill Griebel received a commission for an imaginative wedding cake—to fuse the traditional elegance of a classic cake with a "groom's cake" made of chocolate. She never before had received such a request. But it turned out beautifully, magnificently signifying the merging of a new couple, while reflecting that both husband and wife retained their own identities. On an

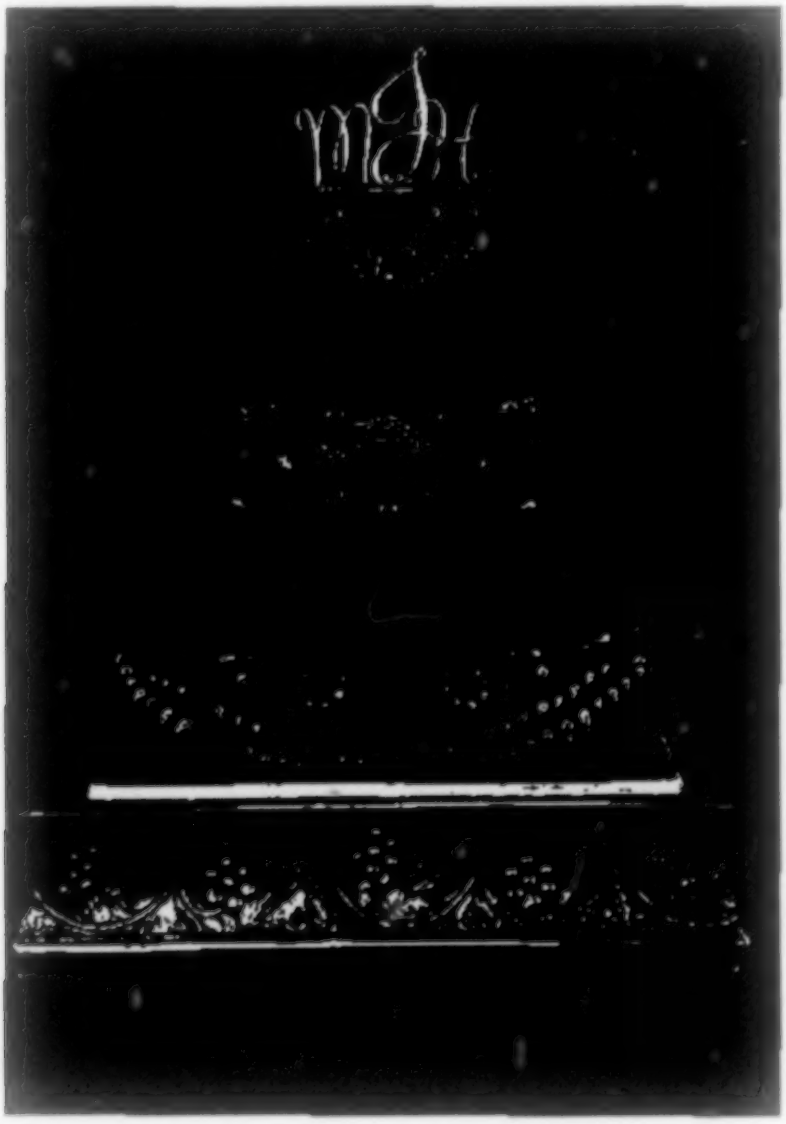




even more playful level, Griebel designed the cake to the right when the bride requested a zebra pattern and hot pink.

Given America's multicultural traditions, it is not surprising that traditional wedding cakes may also be infused with elements that celebrate the heritage of the new couple—yet still be instantly recognizable as an American wedding cake. Kristi Kloos of the Frost Bake Shop designed a cake for a

wedding involving a couple of Indian descent. The result is clearly a traditional wedding cake, but Kloos used colors and shapes to evoke and celebrate the heritage of the couple that turned to her for their cake.



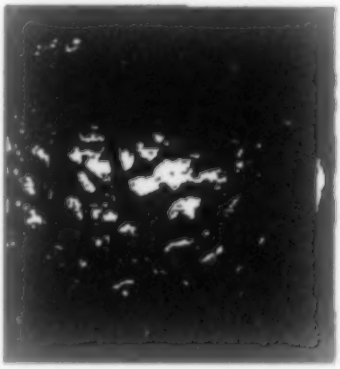
The foregoing cakes are simultaneously imaginative yet clearly evocative of traditional wedding cakes. But there is no reason why a cake cannot celebrate a wedding while looking *nothing* like our traditional conception of a wedding cake.

To take one example, Kim Brittenburg of Kym's

Creations once was asked to make this seemingly macabre, Halloween-themed cake to celebrate a wedding that—perhaps unsurprisingly—was originally planned for late October.



Due to family circumstances, the wedding was moved up to July—but the couple kept the original theme of the cake. Created out of buttercream icing, the cake had multiple features that were special to the couple. The groom, for example, collected exotic spiders—hence the cake-topper to the right (and the "web" spun around the eerie couple to join them). And each "tomb stone" on the cake represented either a departed rock group or a loved one who had passed away. Significantly, the couple loved this cake so much that they *could not bring themselves to cut it* during the wedding reception—it was too meaningful. (They invited guests to come and enjoy it the next day after leaving it as a work of art throughout the wedding evening.) A cake whose owner cannot bear to cut it is a cake that almost by definition is a work of art.



Another imaginative wedding cake (or in this case, a groom's cake), had its origins in as unlikely a place as the pig barn at the Oklahoma State Fair. That was where the future bride and groom met. They were agriculture students at Oklahoma State University, "showing" pigs

for the school. The details of how they met became a central part of their story as a couple. Accordingly, they asked Jennifer Jones of Icing On The Top to construct their story through cake so that they could exhibit it at their wedding reception.



The cake depicts Oklahoma State mascot "Pistol Pete" riding atop a pig. When finished, the cake was three feet high, weighing 125 pounds. The final result is both impressive and hilarious.

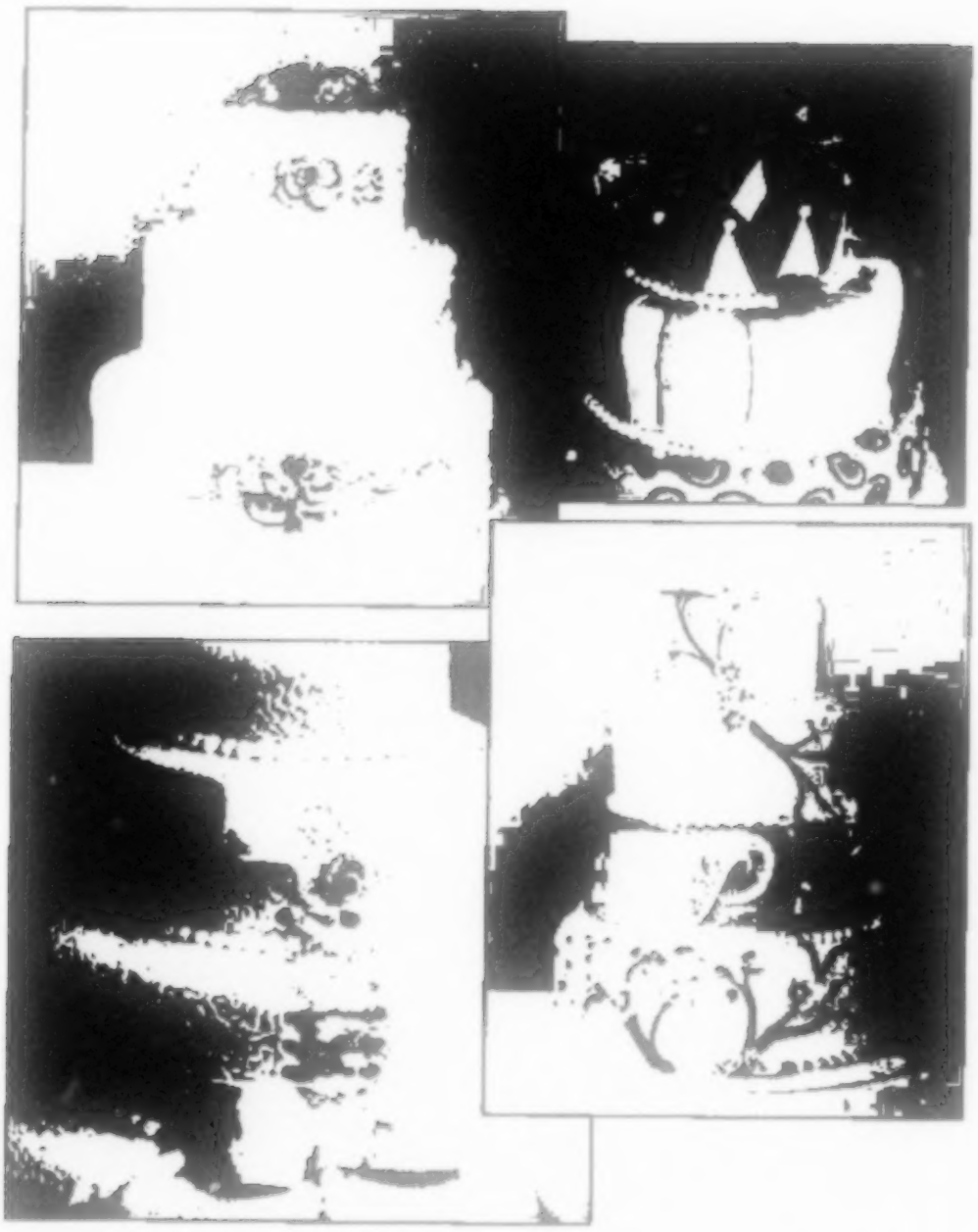
But it was also a monumental undertaking. To provide just a sample of the combination of technical and artistic skill required to make such a cake, consider just a few of the stages required to bring this pig home:



The wedding cakes that petitioner Jack Phillips has created belong, with *amici*'s cakes, in the same category of artistic, custom cakes. Various images of his wedding cakes—made before the rulings of the Colorado tribunals in this case—establish as much. The following images,[3] while reflecting his individual style, are unquestionably

[3] These images were taken from the website of petitioner Masterpiece Cakeshop, http://masterpiececakes.com/wedding-cakes (last visited Sept. 6, 2017). Counsel for petitioners consented to *amici*'s use of these pictures.

the result of extraordinary creativity and effort:



3. *Same-sex wedding cakes can be especially artistic*

Same-sex weddings could (and many do) use cakes that are not notably distinct from any other wedding

cake. But in fact, same-sex wedding cakes have become a comparatively new genre of their own in the world of cake design. Many *amici*, such as Lexi Ginsburg Mota and Kim Brittenburg, have created such cakes, anticipate doing so for many future weddings, and would have welcomed respondents Craig and Mullins had they come to their shops.

Respondents, of course, were ultimately able to enjoy a beautiful cake at their own wedding. The picture shown here is of the actual cake that they cut at their reception. J.A. 176.[4] It is an attractive cake and one that, in at least two ways, is clearly expressive. First, it is instantaneously recognizable as a classic American wedding cake—the cake itself conveys its purpose and the chief message: that a wedding has occurred and warrants celebration. Second, by incorporating the familiar rainbow symbol in the batter, the multicolored cake layers "reveal" that the cake is not just for a wedding, but for a same-sex union.



The rainbow theme is a frequent one for same-sex wedding cakes today. Kim Brittenburg enjoys receiving commissions for such cakes and includes the rainbow theme within each of them in one way or another. Brit-

[4] The image above is taken from a larger picture that is reprinted in full at J.A. 176, and that was originally part of the summary-judgment briefing before the Colorado Civil Rights Commission. The full picture is a classic wedding photo, which shows the newly married couple sharing the first piece of the cake (the piece that has been cut from the cake as shown in the picture above, thus revealing the rainbow layers).

tenburg, who is also the mother of a transgender son, would have gladly accepted respondents' invitation to create something unique and special for their celebration. Brittenburg has emphasized that, in her experience, preparing cakes for same-sex couples is among the *most artistic* wedding commissions that she receives. While traditional wedding cakes are often somewhat more constrained by the conventions with which we are all familiar (although the foregoing examples show substantial examples of vast creativity), she has found that cakes for same-sex weddings are frequently far more open to displays of personality and vivid expression, allowing the cake artist a decidedly freer hand in creation.

The following examples of some of her same-sex wedding cakes illustrate these points. At left, the rainbow appears at the base of each tier and within the cake. And at right, the rainbow appears as a cascade of flowers flowing down a creatively stacked





cake. Of course, the tiered design in both also helps evoke the traditional wedding-cake motif—despite the creativity and distinctions, no one would be surprised to learn that both were designed to celebrate a same-sex *wedding*. Part of an artist's genius can come in creating something new while not entirely abandoning the traditions of the past.

B. Expressive cakes can cement deep meaning for many other occasions

Weddings are by no means the only occasions when cakes express deep meaning in American life. Cake artists assist their clients in innumerable circumstances to add significance and convey thoughts, emotions, exhortations, or celebrations.

To celebrate a colleague upon her departure, a group of co-workers commissioned Jan Sullivan of Bakery Blessings to make a cake in the shape of . . . *a steak*. Why? The departing co-worker—a citizen of the Philippines—had her first steak when they took her out for a welcome lunch upon her arrival at the company. She immediately fell in love and became known for ordering steaks whenever she could. Indeed, her association of steak with being in America became part of her identity with her colleagues. She had remarked that she would miss American steaks when she returned home, and they used the symbol that she associated with America (and that they associated with her) to make her de-



parture more special. Sullivan produced the T-bone "steak cake" shown in this picture—and she used red velvet cake so that when cut, the "steak" would appear to be medium rare—the honoree's favorite order.

Another cake signifying respect and memories is this one, designed by Kristi Kloos of Frost Bake Shop, to commemorate the retirement of a MATA bus driver. The retiring driver's picture appears on the side of the bus, and the affection for her from those who knew and worked with her is unmistakable.



Chelle Jennings of the Mad Batter Bakery designed this five-tier *quinceañera* cake, each with a different flavor and reflecting a disparate message. The birthday girl wanted strawberry shortcake as the top tier; she chose chocolate, her best friend's favorite, for the second; the third was strawberry with strawberry filling; the fourth tier was cham-



pagne flavored, in honor of (and for) the parents; and the fifth and final tier played it safe, with vanilla. As with other tiered cakes, this one was time-consuming and difficult. Each tier was created separately, then they were carefully stacked with dowels to ensure adequate support.

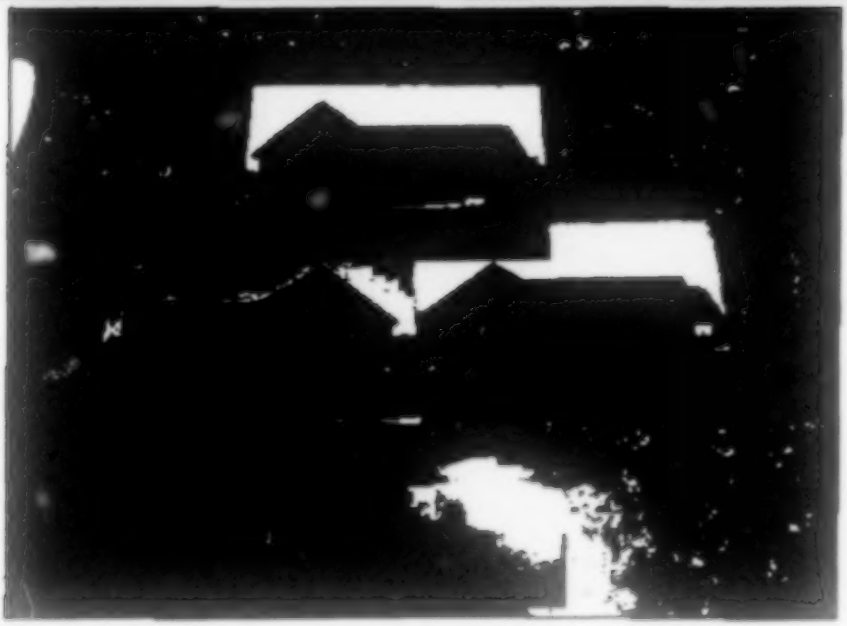
Erin Holloway of Art of Cakes Bakery designed this birthday cake for a young boy who loved magic—and had just come home after a very long stay at a children's hospital:



For a surprise high-school graduation cake, Kim Brittenburg designed a cake that replicated a real house—one that the graduating senior had helped create as part of his vo-tech class. At the end of the school year, the house—which was annually built from the ground-up—

was auctioned off for educational funds. His hard work meant so much to him that his parents wanted the project's completion (represented on the cake) to symbolize the completion of his high-school years. Using only photographs, Brittenburg created a replica using all real cake and buttercream icing (it was made years ago, before fondant was available).





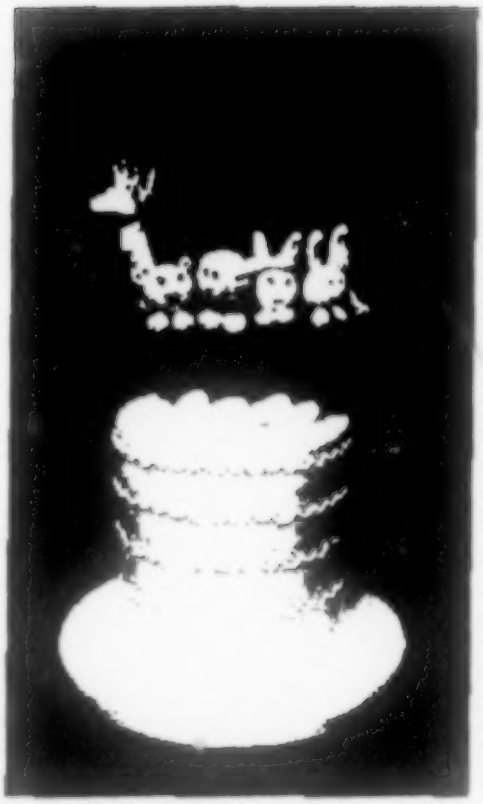


Not just departures or celebrations of the past can be commemorated by cakes. When Erin Holloway's husband returned home from a long deployment serving our nation in the Middle East, she designed this cake to celebrate. His favorite comic book character is Captain America, so she laid Captain America's shield against a camper alongside a replica of her husband's boots, evoking his recent return home. Holloway's husband had always wanted a "teardrop" camper, which simultaneously symbolized the well-deserved rest after a challenging period of service.



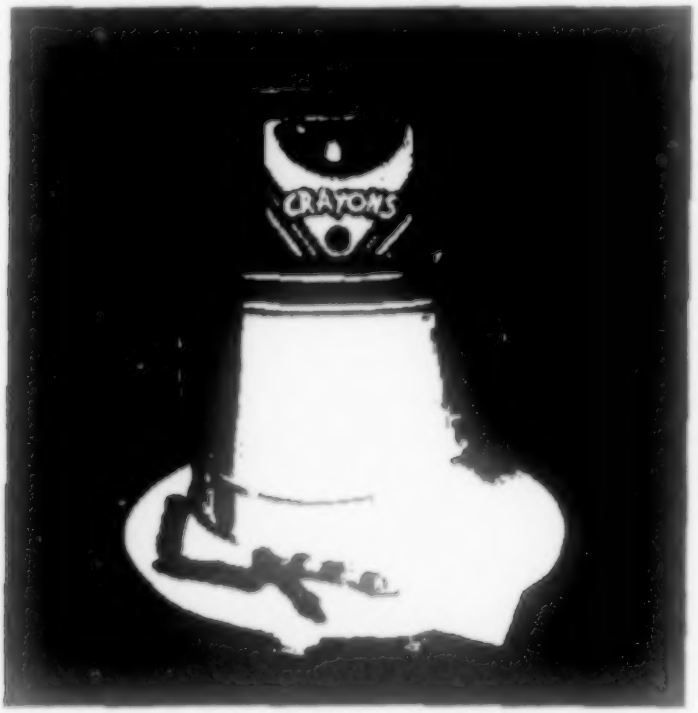
Celebrations of impending births can generate some of the most tender cakes. Sonia Humerickhouse, with her specialty in "naked cakes," designed this beautiful cake the first time she was asked to help commemorate a

baby shower.



And this cake, from Lexi Ginsburg Mota, was designed to celebrate a baby's christening. The new mother's favorite biblical stories included Noah and the Ark—and God's saving of people and animals.

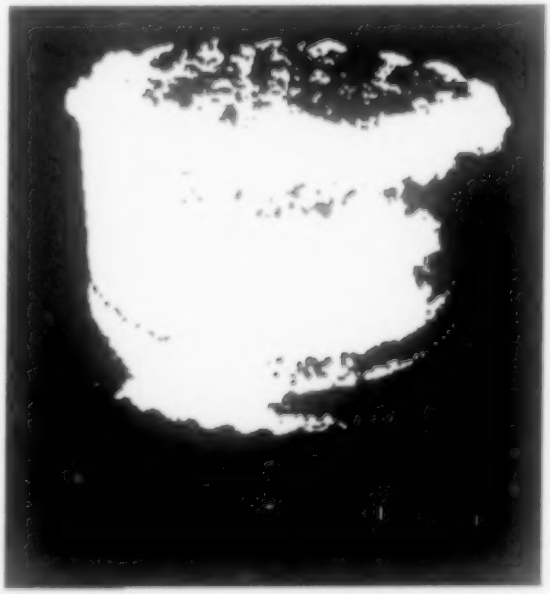
Not every cake conveys exclusively positive emotions, of course. The cake below, also from Mota, was commissioned by a man who in some way (she didn't ask) had greatly offended his significant other, an elementary school teacher. His hope for forgiveness came in this form (and he insisted upon the text in the note):



While custom cakes are artistic in and of themselves, they can also create striking new artistic works when integrated with other art. For example, this image portrays one of Hilary Hummer's earliest cakes, when she was still learning the art of cake design. The cake was made to celebrate Easter, and was placed in front of a painting previously completed by Hummer's husband's aunt. By using cake-design techniques and positioning the cake with the painting, the image of the Resurrection scene was more powerfully evoked.



Another example of cakes combining with other art forms is the "Lane cake"—a tradition from Alabama described in *To Kill a Mockingbird*. A recent NPR story describes it as a "layered sponge cake filled with a rich mixture of egg yolks, butter, sugar, raisins and whiskey." Meredith Bethune, Whatever Happened To The Boozy Cake In 'To Kill A Mockingbird'?, National Public Radio (July



15, 2015).[5] "Perhaps the extravagant dessert is just too difficult to make in these busy times," the author wrote. *Ibid.* "But Lexi Ginsburg Mota, owner of The Cakerie in Birmingham, has carved out a niche as one of the few bakers in the city that makes the traditional cake." *Ibid.* One of her Lane cakes is shown above. The idea that cakes can actually be a repository of both cultural and literary meaning—cakes sustaining other arts—only amplifies their expressive value.

Kim Brittenburg has also made a cake supporting other arts. She created this gorgeous cake for the Arts Council to celebrate their "Growing Up Artfully" event. Each layer represents a different artistic form—music, theater, movies, and the traditional fine arts.



Collectively, *amici* have created hundreds of extraordinary cakes conveying significant meaning. The comparatively few examples here should make clear that cake artists can express almost anything for any occasion. Few arts can simultaneously make one's eyes tear and one's mouth water, but *amici* routinely achieve that goal.

C. Cakes of enormous beauty exemplify custom cakes' artistic character regardless of linkage to any specific purpose or event

Like other artistic mediums, custom cakes—including many of those illustrated—can astonish and provide

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[5] Available at http://www.npr.org/sections/thesalt/2015/07/15/422896049/what-ever-happened-to-the-boozy-cake-in-to-kill-a-mockingbird (last visited Sept. 6, 2017).

sheer aesthetic pleasure in and of themselves, wholly apart from their food value or their commemorative role at a specific event. As a remarkable example of the beauty that a true cake artist can whip out of ordinary ingredients, consider the following cake, designed and perfected by Jennifer Jones. This cake—which she calls "Repetto," honoring the famous ballet shoes—was inspired by Parisian tutus and trim from a prominent Paris stage where ballet is performed.



Each tier of the cake represents a tutu. The tutus are hand pleated with gum paste and then detailed with flow-

ers, trim, and hand-painting to closely resemble actual tutus. The trim on the baseboard holding the cake was molded, painted, and adorned with gum paste pearls to mimic the trim of the ballet stage. The "fabric" on the board is itself made of gum paste. Jones layered a total of 124 gum paste roses between each tier, with a larger rose on the top. Each rose is made of between nine and sixteen gum paste petals, each cut out individually and then, one by one, placed together to create a rose. *Everything in the picture is edible.* This extraordinary cake took two weeks—with several twenty-hour days—to complete.[6]

In fact, beyond the expected awards and accolades that *amici* deservedly have received, at least one has had her work featured at a leading museum. The Birmingham Museum of Art invited Lexi Ginsburg Mota and her colleague to display cakes in August 2017 as part of the museum's "Art on the Rocks" events. "Combining cake artistry with the intricate designs and themes of contemporary art, culinary artists Lexi and Anna from The Cakerie will each make a cake inspired by Third Space," to be displayed at the museum.[7] (Third Space is "the first large exhibition of contemporary art from the Museum's

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[6] Jennifer Jones is featured in a story from the *Tulsa World*, describing how as a "master cake decorator" she offers demonstrations at gatherings with other leading "sugar artists" to help others develop techniques. See Jessica Rodrigo, Fun with Sugar brings 18 artists together for demonstrations, tutorials, Tulsa World (Apr. 13, 2016), available at http://www.tulsaworld.com/scene/food/fun-with-sugar-brings-artists-together-for-demonstrations-tutorials/article_fb69dc7a-2d1d-572b-8518-62a1ef9c9687.html (last visited Sept. 6, 2017).

[7] http://artsbma.org/7-things-to-see-and-do-at-art-on-the-rocks/ (museum's web page describing The Cakerie's exhibit) (last visited Sept. 6, 2017).

own collection."[8])

D. The technical and creative skills used in preparing custom cakes require enormous artistic energy

Many of the cakes shown in this brief require a rare combination of artistic skills and extreme technical precision. The Venn diagram of those who have *both* the visual art skills and the technical art skills is small indeed.

Consider many of the cakes in this brief—Jennifer Johnson's ballet-inspired cake or Lexi Mota's cake inspired by a Herend china pattern or so many others. Few people could reach the level of art required to design and successfully create the purely decorative aspects of these cakes. Likewise, few have the skill or could master all of the details of ensuring that the individual components of the finished product are all exactly what the design calls for and that they can be assembled without collapse or destruction. Was each tier of the cake baked exactly correctly, with the proper structure to support what is placed on top of it? Are the edible materials used for decorations of the right consistency and texture to play their planned role within the cake as a whole? These and many other questions must be answered to avoid disaster being the only reward for their excruciating effort. And on top of all that, the cake must taste delicious. One of the clearest manifestations of the art of custom cakes is making something that should be practically impossible look effortless; *amici* know, however, that only extreme exertion married with surpassing talent can achieve these results.

Cake artists must, therefore, combine a multitude of skills. They must be able to sculpt, to paint, to draw;

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[8] http://artsbma.org/exhibition/third-space-shifting-conversations-about-contemporary-art/ (describing "Third Space") (last visited Sept. 6, 2017).

they must have the aesthetic sense of an interior designer and the architect's ability to convert ideas into three-dimensional, stable products. To take but one example, this wedding cake is one of the tallest that Kristi Kloos has designed. It is beautiful for its structure (and the lace pattern that makes up the cake actually matched the bride's wedding dress). But it was so technically challenging that it actually had to be built *on site*—no margin for error or time for a redo.



As noted above, there is no doubt that petitioner Jack Phillips is a genuine cake artist who uses these skills, as *amici* do. For example, his website[9] shows him engaged in cake-design activities that (along with the artist's concentration and classic art tools) are quite familiar to *amici*. But the public likely only vaguely understands how similar the cake artist's creative process



[9] http://masterpiececakes.com/wedding-cakes.

can be to that of other artists working in other mediums.[10] (The final version of the cake he is shown painting in the picture above appears at *supra* page 16).

This is the work of an artist. Whatever the Court decides with respect to the consequences of his decision to decline the individual respondents' request to design a wedding cake for them, it must start with the premise that they were asking him to create *a work of art* in his capacity as *an artist*.

II. Cake Artists Merit As Much Protection For Their Expressive Work As Artists Using Other Mediums

Amici and their fellow cake artists are entitled to no less protection under the law for their expressive content than any other artist. They take no position in this brief as to exactly what the law should permit or demand of any artist in the context of this case—they do not, for instance, opine as to the proper level of scrutiny or the extent of any of the governmental interests asserted in this litigation. They do not seek any special solicitude distinct from other artists—their only point is that cake artists' work entitles them to *as much* protection as those who work in other mediums. This Court's cases provide a framework that supports this conclusion, and the operation of federal copyright law points in the same direction.

A. This Court's cases make clear that the artistic nature of cake-making is not diminished by its "non-traditional" medium

1. The scope of what can be considered "expression"

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[10] The public clearly *appreciates* the art. Several reality television programs are dedicated to the art of cake-making; indeed, the surprisingly large number of such programs in this genre is a testament to the artistic value of the craft and how enjoyable it can be to see it implemented. See, *e.g.*, https://www.tlc.com/tv-shows/cake-boss/about; http://foodnetwork.com/shows/ace-of-cakes.

for purposes of the First Amendment is not limited to particular mediums or art forms. Even assuming that cake-making involves a "non-traditional" medium for expression, its artistic and expressive value should be secure under this Court's cases.

After all, the Court has advised against viewing protectable expression as narrowly confined to the most frequently encountered or historically established mediums. For example, in *Brown* v. *Entertainment Merchants Association*, 564 U.S. 786, 790 (2011), the Court held that video games—even gratuitously violent ones—warrant some level of First Amendment protection because they "communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)." While recognizing the potential challenges that may arise when applying the Constitution to "ever-advancing technology," the Court reiterated that "'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Ibid.* (quoting *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952)).

While not "new," cake-making could be characterized as a "different medium for communication" that the Court's guidance in *Brown* makes clear is protectable expression. Cake artists indisputably use their cakes as edible vehicles to convey messages and emotions, as illustrated at length in Part I, *supra*. Decorative shapes and images, written words, color schemes, and even flavors are used in the expression of ideas. Cake-making thus cannot be excluded from the sphere of expressive activity simply because cakes are a nontraditional medium for expression.

2. Moreover, the aspects of cake-making that appear

most different from other forms or art and expression largely melt upon examination. These potential objections to affording cake artists the same level of constitutional protection as other artists lack merit.

For example, cakes are perishable, designed to radiate beauty but for a moment, and then to be consumed. But the fact that any given cake is a vanishing work does not distinguish it from artistic performances on the stage (or, indeed, protests on the street). Nature's beauty is no less revealed through the flower that blooms for a single day than through the tree that lives for a thousand years; likewise, an ice sculpture is not inherently less artistic than one carved from stone. The same is true of cakes—they are made from a canvas designed for consumption rather than permanent display. And like other vanishing works of art, cakes can be given a measure of permanence by being recorded—as with the pictures in this brief. Cake is not the only "art" that can be consumed—but the consumption of cake merges more senses (sight, taste, touch, smell) than the consumption of a speech or a song.

3. Another potential objection is that cake-making often uses no language at all—even the most creative wedding cakes rarely include text other than the occasional use of the couple's initials. But just as an artistic medium itself need not be a "traditional" one to qualify as expression, the cake artist need not use any words or explicit messages in his or her design for the activity to qualify as expression. Indeed, this Court has deemed a variety of non-verbal acts to be expressive, even where the message being conveyed is not explicit. In *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, for example, the Court held that parades are a form of expression because they involve individuals marching to make some collective point. 515 U.S. 557, 568 (1995). The Court also determined that both the participation of

certain individuals "as a unit in the parade," as well as the parade organizer's selection (and exclusion) of particular contingents to form the parade, constituted expressive conduct. *Id.* at 570. The Court further elaborated that the protected expression of a parade "is not limited to its banners and songs . . . for *the Constitution looks beyond written or spoken words as mediums of expression.*" *Id.* at 569 (emphasis added). "Noting that symbolism is a primitive but effective way of communicating ideas, our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an armband to protest a war, [and] displaying a red flag." *Ibid.* (internal quotations and citations omitted).

As with the examples cited by the Court, cake artists can communicate messages through symbolism—specifically, through symbolic cake styles, decorations, colors, and other detailing—and thereby engage in expressive activity. And their creations of new forms of beauty, regardless of any *articulable* message, carry no less expressive value than similar images created with oil paint rather than edible paint. This Court has recognized many examples of forms of expression that do not rely on using words to affirmatively assert an idea, including but certainly not limited to:

- music (see *Ward* v. *Rock Against Racism*, 491 U.S. 781, 790 (1989));
- marching or parading while displaying a swastika (see *Nat'l Socialist Party of Am.* v. *Village of Skokie*, 432 U.S. 43, 43-44 (1977) (*per curiam*));
- nude dancing (see *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981));
- indecent, sexually oriented telephone messages (see *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989));

- portrayals of particularly violent and intentional cruelty to animals (see *United States* v. *Stevens*, 559 U.S. 460, 468 (2010));
- burning the American flag (see *Texas* v. *Johnson*, 491 U.S. 397, 406 (1989));
- saluting the flag (see *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 632 (1943));
- charitable solicitation without having to reveal the amount of overhead as a proportion of a charity's income (see *Riley* v. *Nat'l Fed. of the Blind*, 487 U.S. 781, 795-797 (1988));
- the Boy Scouts as an "expressive association" (see *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 656 (2000));
- picketing against homosexuality and the Roman Catholic Church at a public military funeral (see *Snyder* v. *Phelps*, 562 U.S. 443, 458 (2011));
- describing a credit-card fee as a surcharge (see *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017); and
- lying about having won military honors (see *United States* v. *Alvarez*, 567 U.S. 709, 724-725 (2012) (plurality op.)).

If activities such as those described above are expressive activities, there should be little doubt that cake-making is also a form of artistic expression. The design and creation of custom cakes cannot plausibly be on the other side of the line from those activities without rendering incoherent any principled effort to delineate the boundary.

4. Another objection turns on the client's role in cake-making—but this is another illusory distinction. True, cake artists often incorporate messages provided by others (*e.g.*, the customers) into their work, but this Court has clearly held that a speaker need not be the originator of a message for it to be expression. See, *e.g.*, *Hurley*,

515 U.S. at 569-570 ("But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.").

In fact, this Court has previously found that a party engaged in protectable expression by broadcasting messages generated by others. See, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 636 (1994) (acknowledging that cable operators engage in speech through "editorial discretion" even if they exclusively select programs that were produced by others); *New York Times* v. *Sullivan*, 376 U.S. 254, 265-266 (1964) (holding that the selection of noncommercial advertisements for a newspaper was protected expression). Cake-making is thus made no less expressive when a significant part of the message is being provided by a paying customer. The cake artist—like the Renaissance painters who worked on commission and indeed like artists in every medium—is the one who must invest her artistic skills and energy to create something that responds to the client's hopes.

This latter point should also dispose of the notion that compensation changes the equation. "[A] speaker is no less a speaker because he or she is paid to speak." *Riley*, 487 U.S. at 801. Like other artists working in any other medium, cake artists are often and deservedly paid for their work; it is how they support their families. But preparing cakes like those described above and those that appear in this brief is not merely "commercial." It is a creative and artistic activity, not fundamentally different from the commissioning of a portrait, a sculpture, or an opera. Many *amici* and other cake artists have standards of artistic and aesthetic sensibilities of their own

that will constrain the way that they create or build a cake—and sometimes can lead them to refuse certain commissions altogether, despite the pay. In some cases, these aesthetic standards are also influenced or even compelled by moral, religious, or political beliefs. Because cake artists, like other kinds of artists, become known for the quality and expressive value of their work, it should be no surprise that—despite the vast bulk of cake artists' efforts to accommodate every potential client—there will be some commissions that they will decline. This, too, is in the nature of art.

B. Copyright law illustrates why cakes can have artistic value

Like video games and other expressive mediums, custom cakes incorporate both functional and artistic elements. Neither video games nor cakes serve the exclusive purpose of being "art"—the former requires mechanical elements (such as consoles and controllers) to facilitate play by the user, and the latter incorporates a variety of essential elements (flour, eggs, sugar, structural components such as dowels and platforms, etc.) to generate an edible—and displayable—final product.

Notably, both Congress and this Court have recognized that dual-purpose products—those with both artistic and utilitarian elements—have protectable artistic value. In particular, the Copyright Act provides that "useful articles" are "eligible for copyright protection as artistic works" if the artistic elements "'can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.'"[11] See *Star*

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[11] In general, the Copyright Act provides protection for "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102. "Works of authorship" in-

Athletica, L.L.C. v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007, 1010 (2017) (quoting 17 U.S.C. § 101).

In *Star Athletica*, the Court clarified the test for copyright eligibility of useful articles, stating that the artistic feature is eligible for copyright protection if it: (1) "can be perceived as a two- or three-dimensional work of art separate from the useful article" and (2) "would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated." 137 S. Ct. at 1007. In that case, the Court found that designs on a cheerleading uniform were eligible for copyright protection because the decorations on the surface of the uniforms had "pictorial, graphic, or sculptural qualities" and "would qualify as 'two-dimensional . . . works of . . . art'" if separated from the uniform and placed on another medium, such as a painter's canvas. *Id.* at 1012 (quoting 17 U.S.C.§ 101).

By the same token, a sufficiently original artistic design or structure on a cake would similarly be eligible for copyright protection as an artistic work if applied to a different medium of expression. In fact, a search of "cake design" in Library of Congress Copyright Catalog reveals *thousands* of registered copyrights relating to

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clude "pictorial, graphic, and sculptural works," which are defined by the Copyright Act as including "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions" as well as "works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned." 17 U.S.C. § 101. Regarding useful articles, the statute states that the design may be protected "to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." *Ibid.*

cake design.[12] The fact that copyright law protects items like the uniform chevrons in *Star Athletica* as "artistic works," combined with the existence of copyrights on cake designs at a massive scale, demonstrate that cake-making is an artistic and expressive—rather than a purely mechanical or utilitarian—endeavor.

CONCLUSION

For the foregoing reasons, this Court should make clear in its opinion—regardless of which party ultimately prevails in this particular case—that cake artists are indeed practitioners of *an expressive art* and that they are entitled to the same respect under the First Amendment as artists using any other medium.

Respectfully submitted.

AARON M. STREETT
BENJAMIN A. GESLISON
J. MARK LITTLE
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
(713) 229-1234

EVAN A. YOUNG
Counsel of Record
SAMANTHA KUHN
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Suite 1500
Austin, Texas 78701-4078
(512) 322-2500
evan.young@bakerbotts.com

Counsel for Amici Curiae

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[12] http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?Search_Arg=cake+AND+design&Search_Code=FT*&PID=q7MJiumtWHupdeBzmYi_9eA-REAL&SEQ=20170906072513&CNT=25&HIST=1 (last checked Sept. 6, 2017).